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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1954

No. ~~95 Misc.~~ 406

ELIE J. BOUDOIN,

Petitioner

vs.

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the following questions:

1. Is the decision of the United States Court of Appeals for the Fifth Circuit in conflict with the holdings of other circuit courts?

2. Is the respondent liable for negligence under the Jones Act for an assault committed by one seaman upon another seaman when the assault:

(a) was wholly unconnected with work aboard respondent's vessel;

(b) the assailant had no authority or control over the victim; and

(c) the assailant had not been guilty of any prior misconduct whatsoever aboard the vessel so that the ship's officers did not have and could not have had any actual or constructive knowledge that he was likely to injure anyone?

3. Is the respondent's vessel unseaworthy when the assailant did not possess known vicious traits?

STATEMENT OF THE CASE

The petitioner was employed aboard the respondent's SS MASON LYKES in the capacity of oiler during a foreign voyage which commenced from and ended in New Orleans between September 6, 1949 and December 19, 1949.

During the late hours of November 24, 1949 (Thanksgiving Night) and early hours of November 25, 1949, three unlicensed crewmen, off duty and having no work to perform until the next morning, were in the forecastle of the boatswain talking and having drinks. One of the men was Manuel Gonzales, the alleged assailant involved in this case.

Petitioner had been drinking ashore on the afternoon of November 24th, and, upon returning to the vessel, had gone

to bed about 5:00 p. m. that day. About 2:00 a. m. on the morning of November 25, 1949, while petitioner was asleep or almost asleep in his bed, Gonzales left the boatswain's room and went into the room of petitioner to obtain a bottle of brandy from under petitioner's bed. When petitioner was startled in the semi-darkness by the shape and person of Manuel Gonzales close to his bed, he arose from his bed and accosted Gonzales, whereupon Gonzales struck him on the back of the head with the bottle which he, Gonzales, had taken. As a result of the blow on the head, petitioner suffered personal injuries for which the District Court awarded damages and maintenance. The maintenance part of the judgment was paid, and the respondent appealed from the damage award to the Fifth Circuit Court of Appeals.

The Circuit Court reversed the judgment of the District Court and held that the respondent was not negligent because: (1) the officers of the ship did not have actual or constructive knowledge that the assailant had been drinking aboard the ship; (2) the officers did not know and had no reason to believe that anyone aboard the ship was likely to be injured as a result of the three men drinking in the boatswain's room; (3) the record does not contain substantial evidence to support a finding that any of the officers knew, or should have anticipated, that the assailant would attack and injure a fellow crewman; (4) the vessel was not unseaworthy because the officers of the ship did not know or have reason to believe that the assailant possessed a violent or belligerent disposition; and (5) that the assailant did not in fact possess such a disposition.

Although the Fifth Circuit Court did not accept the so-called principle of the Second Circuit decision of *Keen vs.*

Overseas Tankship Corp. (discussed hereafter), in view of the later Second Circuit decision of *Jones vs. Lykes Bros. Steamship Co., Inc.* (also discussed hereafter), the decision herein, in its conclusion and holding, is in accord with the Jones case and is not in conflict with any decision of the United States Circuit Courts of Appeals, or any decision of this Court or any State Courts.

ARGUMENT

POINT 1

THE RULING OF THE CIRCUIT COURT OF APPEALS THAT THE RESPONDENT WAS NOT NEGLIGENT IS CORRECT

Solely issues of fact were involved in the question of respondent's liability for damages under the Jones Act. **The District Court did not hold that the officers of respondent's vessel knew that the assailant and his friends were drinking in one of the rooms aboard the ship;** what the District Court held, however, was that the ship's officers "knew or should have known" that the men were drinking aboard the vessel and should have anticipated that such conduct might lead to someone sustaining injury. But that holding by the District Court was not supported by the evidence, and the Circuit Court of Appeals so held (R. p. 510).

The record does not contain a scintilla of evidence that establishes or indicates the officers knew the men were drinking aboard the ship (R. pp. 277, 336, 357, 362) but, to the contrary, the record definitely shows that they had

no reason to be aware of the fact since: (1) the drinking participants were not loud or boisterous, and (2) the assailant and his companions at no time evidenced any violent mood and at no time indicated any intent to do harm or injury to anyone. The petitioner himself (who was the only factual witness who testified for the plaintiff at the trial) stated that the men were not creating a disturbance when he said that one would have to pass in the immediate vicinity of the forecastle involved to hear the men talking. See R. p. 82 where the plaintiff answered the following question:

> "Q. Can you tell us whether or not the voices and noise carried through the vessel? (Referring to the men who were drinking aboard the ship)
>
> "A. I wouldn't say carried through the vessel, as we have a pretty big place there, and the cargo winches going on outside, and couldn't tell. If you were on the opposite side of the messhall, you couldn't tell whether it was cargo winches or the noise of the ship, or the natives ashore on the dock, or what it was."

In addition to the above, the record is completely barren of evidence to suggest, let alone to establish, that the drinking participants had been guilty of misconduct aboard the vessel prior to the night in question; and not a scintilla of evidence is available to establish or indicate that the officers of the ship knew or should have known that the assailant would injure a fellow crewman. (R. pp. 277, 335, 336, 357, 362, 363).

In view of the above facts, the authorities cited by petitioner do not in the least support his position. In *Koehler vs. Presque-Isle Transportation Co.*, 141 F. (2d) 490, 1944 A.M.C. 432 (C. C. A. 2) there was evidence: (1) of prior misconduct by the assailant which was known to the vessel's officers (the second officer saw the assailant "pick" a fight and "beat up" a fellow seaman); (2) that the third officer saw the assailant "yelling and swearing" at the plaintiff; (3) that the plaintiff told the second officer, prior to the assault giving rise to the action, that the assailant had attacked him; and (4) that the officers knew the assailant was "waiting" for the plaintiff to attack him. There is no such evidence at all in the present case.

In the case of *Jensen vs. United States*, 184 F. (2d) 72, 1950 A.M.C. 1797 (C. C. A. 3) the evidence established: (1) that one of the ship's officers told the assailant to hold off fighting a crew member until both men returned to the ship; (2) that it was the custom on the vessel to permit crew members to fight, using a hatch cover as a ring; (3) that the custom was observed in the involved incident, the ship's officers acting as anxious boxing fans with the vessel's floodlights illuminating the improvised ring (hatch cover). The plaintiff was injured as he attempted to prevent the assailant from using a knife on his boxing opponent. Again, there is no such evidence at all in the instant case.

Certainly these two decisions are far afield from the factual aspects of the instant case. When men are repeatedly violent and belligerent (as in the *Koehler* case, supra), or make extensive preparations for a fistic encounter (as in the *Jensen* case, supra), one may conclude that their acts may "reasonably be expected to result in injuries to others".

But, in the instant case, where the assailant and others had been merely involved in a friendly gathering and drinking, unaccompanied by violence or boisterousness, they were not performing acts which may "reasonably be expected to result in personal injuries", as the Court of Appeals correctly held.

Petitioner's statement that "the theory of negligence alleged . . . to impose liability has not heretofore been considered by this Honorable Court in a case involving the Jones Act," is merely an attempt by petitioner to obtain review of the case by an asserted but unfounded claim of novelty. Actually, however, as in most cases under the Jones Act, the exclusive question before the Court of Appeals was a question of fact, the question of whether the alleged negligence existed and, if so, whether it was the proximate cause of the accident. See 46 USCA 688; *Pittsburgh vs. Palo*, 64 F. (2d) 198 (C. C. A. (6th) 1933); *Jackson vs. Pittsburgh S. S. Co.*, 131 F. (2d) 668 (C. C. A. (6th) 1942); *Naylor vs. Isthmian S. S. Co.*, 187 F. (2d) 538 (C. C. A. (2d) 1951); *Reynolds vs. Atlantic Coast Line R. Co.*, 196 F. (2d) 643 (C. C. A. (5th) 1952). Since the alleged assailant had no control or authority over petitioner; since the alleged assault was unconnected with the assailant's duties aboard the vessel; since the assailant was never guilty of misconduct prior to the involved assault; and since the vessel's officers not only did not know, but could not be fairly said to have had any reason to know, that the men were drinking aboard the ship or that anyone would attack and injure a fellow crewman, the Court of Appeals properly concluded that the District Court's decision was unsupported by the record and held that the respondent was not in fact negligent.

POINT 2

THE RULING OF THE COURT OF APPEALS THAT THE VESSEL WAS NOT UNSEAWORTHY IS CORRECT

The District Court held that the respondent's vessel was unseaworthy because the assailant was not "during the voyage in question, equal in disposition to the ordinary men of the calling". That holding was predicated upon the case of *Keen vs. Overseas Tankship Corp.*, 1952 A.M.C. 241, 194 F. (2d) 515 (C. C. A. 2) which held that the ship's warranty of seaworthiness includes a warranty to individual seamen that the other seamen are equal in disposition and seamanship to the ordinary men of the calling. That decision, however, is out of harmony with the long and well established jurisprudence on the subject, which holds that the vessel's warranty of seaworthiness, applied to assaults committed by unlicensed crew members, means that the shipowner is liable only if the assailant possessed vicious proclivities based upon a number of assaults, vicious in nature, and occurring so that the ship's officers knew or should have known the assailant's disposition. See *E. W. Ward, Jr.*, 20 F. 702 (1884); *Hurley v. The Lizzie Frank*, 31 F. 477 (D. C. Ala. 1887); *The Rolph*, 299 F. 52, 1924 A.M.C. 942 (C. C. A. 9); *Yukes v. Globe Steamship Corporation*, 107 F. (2d) 888 (C. C. A. (6th) 1939); *Lykes Bros. Steamship Co., Inc. v. Grubaugh*, 1942 A.M.C. 1305, 128 F. (2d) 387 (C. C. A. 5); *Kyriakos v. Goulandris*, 151 F. (2d) 132, 1945 A.M.C. 1041 (C. C. A. 2); *Brailas v. Shephard Steamship Co.*, 1946 A.M. C. 51, 152 F. (2d) 849 (C. C. A. (2d) 1945); *Kable v. United States*, 1948 A.M.C. 1595, 169 F. (2d) 90 (C. C. A. 2); *Hughes on Admiralty*, 2nd Ed. (1920 p. 205, 206; *The Law of Seamen, Norris*, Volume 2 1952 p. 374).

It is therefore submitted that the Court of Appeals was correct in rejecting the principle of the Second Circuit Keen decision.

However, even within the principle of the Keen decision, the instant case is not one of liability, and the Court of Appeals specifically so held.

The District Court's decision in the instant case was rendered on May 14, 1953; however, on June 4, 1953 the Court of Appeals for the Second Circuit (the same Court which had decided the *Keen* case) rendered judgment in the case of *Jones v. Lykes Bros. Steamship Co., Inc.*, 204 F. (2d) 815. It decided therein the issue of unseaworthiness in a seaman's assault case in favor of the shipowner, all in spite of the brutal nature of the assault and the extensive injuries received by the plaintiff. **It there followed the well established standards of liability which existed in such matters since the case of The Rolph,** 299 Fed. 52, 1924 A.M.C. 942 (C. C. A. 9), **and from which the courts had not departed prior to the Keen decision.** In effect, therefore, the Second Circuit has now repudiated its earlier holding (in *Keen*) that a shipowner warrants to each seaman that the other seamen aboard its vessel are of equal temperament and disposition, and has now recognized (in *Jones*) that in the ultimate analysis each case must be decided on its own particular facts.

Petitioner, in its brief, has made no effort to discuss or to analyze the Jones decision; indeed, petitioner has ignored the case as though it did not exist; all in spite of the fact that the Fifth Circuit herein fully discussed that case

and held, in effect, that the facts of the instant case do not fall within the scope of the Keen case, but fall within the scope of the Second Circuit's later holding in the Jones case. The Circuit Court stated:

> " . . . We, therefore, decline to accept the so-called standard laid down in the Keen case *or to approve the action of the Court below in attempting to apply it here.*
>
> **"We might say in passing, though, that since the assailant in this case did not use a meat cleaver but a bottle, and since he did not, as the assailant did in Jones vs. Lykes, commit mayhem on the plaintiff while he was down and out, we do not believe that the District Judge would have thought this was a case for the application in favor of the victim of the equal disposition standard if he had known that its creators would refuse to apply it in favor of the victim in the Jones case."**

This makes it plain that while the Fifth Circuit does not approve the *Keen* decision, it has not decided the present case on that basis. It has decided the present case, on its facts, consonantly with the *Jones* decision — and thus there is actually no genuine divergence between Circuits under the particular facts of this case. The claim that there is such a divergence is illusory and untenable.

The conclusion of the Circuit Court that the instant case on its facts falls within the *Jones* decision where the ship was held not to be unseaworthy, and not within the *Keen*

decision where the contrary conclusion was reached, was predicated upon the following affirmatively established and virtually undisputed facts about the assailant:

(1) Excluding the instant case, he was never guilty of any assault aboard the MASON LYKES or any other vessel; and he had been on the MASON LYKES for several months before the involved incident (R. pp. 277, 325, 362, 363 and 390).

(2) He has never been charged or investigated by the United States Coast Guard for misconduct, assaults, or fights (R. 390).

(3) He was and has been in good standing with the United States Coast Guard since he entered the marine service in 1946 (R. 233, 390).

(4) He has been and is in good standing with his union, the National Maritime Union (R. 233), as distinguished from petitioner who has been expelled from said union (R. pp. 110-111).

(5) He has been going to sea since the involved incident without a blemish on his maritime record and service.

CONCLUSION

It is therefore respectfully submitted that the decision in the instant case is in accordance with the prevailing law

on the subject and that there is no sound basis for the granting of the petition for certiorari, and thus the request for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that I have served copies of the foregoing brief on counsel for all parties of record by mailing them to their respective offices this ____ day of _____, 1954.

_____
Joseph M. Rault